

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 4

Docket No. CH-3443-08-0260-I-1

**Verlyn A. Brown, Jr.,
Appellant,
v.
United States Postal Service,
Agency.**

January 8, 2009

Jeffrey W. Bruce, Esquire, Belton, Missouri, for the appellant.

Aerie Parkinson, Esquire, Denver, Colorado, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his appeal under the Veterans Employment Opportunities Act (VEOA) of 1998 for lack of jurisdiction. For the reasons set forth below, we DENY the petition for failure to meet the criteria for review under [5 C.F.R. § 1201.115](#)(d), REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED, denying the appellant's request for corrective action under VEOA.

BACKGROUND

¶2 The appellant is a preference-eligible, having been honorably discharged from the Navy after active duty service from May 1970 to February 1972. Initial Appeal File (IAF), Tab 11, Exhibit (Exh.) 2; Petition for Review File (RF), Tab 13, Exh. 1. He was placed on an agency employment register for the position of Custodian on January 30, 2002, with five points added to his examination score to reflect his veterans' preference, and was hired by the agency as a Custodian on November 26, 2005. IAF, Tab 6, Exh. A, Tab 11, Exh. 2; RF, Tab 13, Exh. 2. The appellant filed a complaint with the Department of Labor (DOL) on February 15, 2007, alleging that non-veterans were hired in Custodian positions ahead of him. RF, Tab 13, Exh. 9. He filed this Board appeal on December 27, 2007. IAF, Tab 1.

¶3 The administrative judge (AJ) issued an Order to Show Cause setting forth the VEOA jurisdictional criteria, including the requirement that an appellant exhaust his DOL remedy. IAF, Tab 12. To do so, an appellant must show that he filed a complaint with the Secretary of Labor and that the Secretary was unable to resolve the complaint within 60 days or had issued a notification that there was no resolution. *Id.* (citing *Mitchell v. Department of Commerce*, [106 M.S.P.R. 648](#), ¶ 4 (2007), *aff'd*, 276 F. App'x 1007 (Fed. Cir. 2008)). The AJ also informed the appellant that the statutory 60-day time limit for filing a complaint with DOL, set forth at [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#), was subject to equitable tolling, citing *Kirkendall v. Department of the Army*, [479 F.3d 830](#), 844 (Fed. Cir.) (en banc), *cert. denied*, 128 S. Ct. 375 (2007). IAF, Tab 12. The appellant responded with a statement that “[i]nitially this complaint started with the EEOC, Oct. 16, 2006” where it was dismissed, and that he was then sent to DOL. *Id.*, Tab 14.

¶4 In the initial decision (ID), the AJ held that the appellant failed to make a nonfrivolous allegation of jurisdiction because his DOL complaint was not filed within 60 days of the agency's alleged violation of veterans' preference rules.

IAF, Tab 17. She also held that equitable tolling of the deadline was not applicable. *Id.*

¶5 The appellant filed a petition for review asserting that equitable tolling should apply because, despite his inquiries, the agency failed to provide him with information regarding the status of his Custodian application or who was hired before him. RF, Tab 9. The Board issued an Order setting forth the specific circumstances under which equitable tolling is permitted and provided the parties with an opportunity to submit further evidence and argument. *Id.*, Tab 12. The appellant made a submission in response, arguing that he meets the criteria for equitable tolling and that the case should be remanded for proceedings on the merits. *Id.*, Tab 13. The agency filed a response in opposition to the application of equitable tolling. *Id.*, Tab 14.

ANALYSIS

¶6 After fully considering the filings in this appeal, we find that the appellant has not produced new, previously unavailable, evidence, nor has he shown that the AJ made an error in law or regulation. See [5 C.F.R. § 1201.115\(d\)](#). We further discern no error in the AJ's determination that equitable tolling does not apply in this case. See *Irwin v. Department of Veterans Affairs*, [498 U.S. 89](#), 96 (1990) (federal courts have typically extended equitable relief sparingly, including those situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass; it does not extend to what is at best a "garden variety" claim of excusable neglect). Therefore, we DENY the appellant's petition for review.

¶7 We reopen the case on our motion under [5 C.F.R. § 1201.118](#), however, because it was error to dismiss the appeal for lack of jurisdiction.

The appellant filed an untimely DOL complaint and the criteria for equitable tolling has not been met.

¶8 The appellant filed a DOL complaint on February 15, 2007. He filled in the portions of the complaint form relating both to VEOA and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and alleged that non-veterans were hired ahead of him. RF, Tab 13, Exh. 9. The record indicates that the appellant's complaint was initially treated solely as a complaint under USERRA and referred to the Office of Special Counsel (OSC). IAF, Tab 11, Exh. 3, Tab 14; RF, Tab 13, Declaration of Appellant ("Declaration"). The appellant filed his Board appeal following the OSC determination that there was no USERRA violation. IAF, Tab 1. During the pendency of the appeal, he consulted an attorney who advised him that DOL's processing of his complaint under USERRA only may have been an error. RF, Tab 13, Declaration. Therefore, the appellant also filed a second complaint with DOL regarding his VEOA claim on or about January 26, 2008. IAF, Tab 14 at 7; RF, Tab 13, Declaration. DOL closed its investigation of that claim on February 5, 2008. IAF, Tab 11, Exh. 3; RF, Tab 13, Exh. 14. On appeal to the Board, the appellant clarified that he was not alleging that the agency discriminated against him on the basis of his military service but rather that it violated his veterans' preference rights, i.e., that his claim was not under USERRA but only VEOA. IAF, Tab 10.

¶9 In the ID, the AJ utilized the date of filing of the appellant's second VEOA complaint with DOL in January 2008 for purposes of determining timeliness. We find, however, that the appellant's first DOL complaint on February 15, 2007, is the one that should be examined for purposes of timeliness, because it set forth a

claim related to veterans' preference.¹ The February 15, 2007 complaint to DOL was filed more than 14 months after the appellant was hired as a Custodian on November 26, 2005, and thus more than 14 months after any violation of veterans' preference rules by the agency in failing to hire him for the position earlier. The complaint was filed more than one year after the expiration of the statutory 60-day time limit for filing set forth at [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#). The appellant's February 15, 2007 complaint to DOL therefore was untimely.

¶10 As the AJ correctly stated, the 60-day deadline is subject to equitable tolling under the ruling by the Board's reviewing court in *Kirkendall*, 479 F.3d at 844. The court stated that it was guided by *Irwin v. Department of Veterans Affairs*, [498 U.S. 89](#), 96 (1990). *Kirkendall*, 479 F.3d at 836. The U.S. Supreme Court explained in *Irwin* that "[f]ederal courts have typically extended equitable relief only sparingly[,]” allowing it where a claimant has actively pursued a remedy by filing a defective pleading during the statutory period for filing, or where he was induced or tricked by the other party's misconduct into allowing the filing deadline to pass. 498 U.S. at 96; *see also Mitchell*, [106 M.S.P.R. 648](#), ¶ 10. Equitable tolling generally will not apply where the claimant failed to exercise due diligence to preserve his legal rights. *Irwin*, 498 U.S. at 96; *Mitchell*, [106 M.S.P.R. 648](#), ¶ 10. The appellant argues that he meets both criteria of the test for equitable tolling. RF, Tab 13. We find, however, that the appellant has not shown that either criterion is met and that equitable tolling therefore does not apply.

¶11 The appellant asserts that after being placed on the employment register for a Custodian position, he regularly inquired about his status and was told that he would be notified when a position was available. RF, Tab 13, Declaration. He

¹ This finding by the AJ is not prejudicial to the appellant's substantive rights and so does not provide a basis for reversal of the ID. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

stated that the agency's representatives did not inform him who or how many others had already been hired. *Id.* The appellant also stated that in January 2006, he specifically inquired about whether there had been hiring in violation of his veterans' preference rights and that he requested, but was not provided with, documentation that those hired before him had higher scores. *Id.* He stated that he was told in January 2007 by his new wife, an agency manager, that she knew of several non-veterans having been hired before him, and that this prompted him to file the DOL complaint of February 15, 2007. *Id.* The appellant therefore argues that the agency engaged in misconduct because it "repeatedly misrepresented" to him that his name had not yet been reached on the register. RF, Tab 13. He also argues that his February 15, 2007 complaint, which was initially processed under USERRA, constituted a defective pleading within the statutory 60-day period. *Id.*

¶12 We find that the appellant has not shown that the agency engaged in misconduct merely by informing him his name had not been reached on the register or declining to produce proof of the scores of others hired before him.² Moreover, it is clear that the appellant suspected in January 2006 (fewer than 60 days after he was hired) that his veterans' preference had been violated, and yet he failed to file a timely complaint with DOL. RF, Tab 13, Declaration. There is no evidence of misconduct by the agency and no evidence that its actions induced or tricked the appellant into allowing the filing deadline to pass. Rather, the record indicates that the appellant's failure to file a timely DOL complaint was a

² We note that the appellant did not submit an affidavit from his wife regarding her alleged knowledge that non-veterans had been hired before him. His declaration regarding her statement is hearsay. Relevant hearsay is admissible in Board proceedings. *See, e.g., Anderson v. Department of Transportation*, [827 F.2d 1564](#), 1575 (Fed. Cir. 1987); *Borninkhof v. Department of Justice*, [5 M.S.P.R. 77](#), 83 (1981). Under the circumstances of this case, however, we do not find the appellant's declaration probative, where it is unsupported by any other evidence. *See Borninkhof*, [5 M.S.P.R. at 87](#).

result of his own lack of due diligence in preserving his legal rights, which is not grounds for equitable tolling. *See Mitchell*, [106 M.S.P.R. 648](#), ¶ 10. The appellant argues that he did not have information to show that his veterans' preference rights may have been violated until January 2007. However, the Board has held that "such an argument does not fall within the limited scope of cases to which equitable tolling is applicable." *Id.*

¶13 Furthermore, the appellant's initial DOL complaint on February 15, 2007, was not, as he asserts, a defective pleading³ filed within the statutory period. Although DOL treated it as a USERRA claim, the complaint raised a VEOA claim of denial of a veterans' preference right. RF, Tab 13, Exh. 9. Moreover, the complaint was not filed within the statutory 60-day period but, as noted above, more than one year after the expiration of the statutory period. The appellant also argued on appeal that he initially filed an EEO complaint regarding this matter in October 2006. IAF, Tab 13. However, he has not produced a copy of the EEO complaint to show whether it attempted to raise a veterans' preference claim, and in any case it also was filed beyond the 60-day deadline, i.e., some 11 months after he was hired. Therefore, there is no evidence that the appellant filed a defective pleading within the statutory period.

¶14 Because there is no indication that the appellant pursued his remedy in any forum within the statutory period or that his failure to file a timely VEOA complaint with DOL was the result of misconduct by the agency or DOL, equitable tolling is inappropriate. *See Heckman v. Department of the Interior*, [109 M.S.P.R. 133](#), ¶ 21 (2008); *Mitchell*, [106 M.S.P.R. 648](#), ¶ 10.

³ A defective pleading may be one that does not satisfy the criteria for the pleading, but that nevertheless manifests an intention to do so. *Cf. Greco v. Department of Homeland Security*, [110 M.S.P.R. 135](#), ¶ 8 (2008) (finding that an incomplete Board appeal was a defective filing that would nonetheless be treated as timely filed).

An untimely DOL complaint is not grounds for dismissal for lack of jurisdiction.

¶15 As discussed above, to establish Board jurisdiction over an appeal brought under VEOA, the appellant must show, inter alia, that he exhausted his remedy with DOL by filing a complaint with the Secretary of Labor and that 60 days have passed without resolution or the Secretary of Labor issued written notification that there was no resolution.⁴ However, because the 60-day period for filing with DOL is subject to equitable tolling, “an employee’s failure to file a complaint with DOL within the 60-day filing period does not summarily foreclose the Board from exercising jurisdiction to review the appeal.” *Mitchell*, [106 M.S.P.R. 648](#), ¶ 4 (citing *Kirkendall*, 479 F.3d at 835-44 & n.2).

¶16 In *Garcia v. Department of Agriculture*, 2009 MSPB 1, the Board recently clarified the law surrounding the question of jurisdiction where an appellant has failed to timely file a DOL complaint and equitable tolling does not apply. The Board cited the decision of the Federal Circuit in *Kirkendall*, 479 F.3d at 835, that failure to meet the 60-day time limit for filing a DOL complaint under [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#) is not a failure to exhaust administrative remedies that deprives the Board of jurisdiction over a VEOA claim and the deadline is therefore subject to equitable tolling. Accordingly, the Board held that the initial decision dismissing the appeal in *Garcia* for lack of jurisdiction was error, where the appellant who had filed an untimely complaint was a preference-eligible and made a nonfrivolous allegation of a violation of a statute relating to veterans’ preference after October 30, 1998.

⁴ To establish Board jurisdiction over a VEOA appeal, one must also show that he is preference-eligible and make a nonfrivolous allegation of violation of a veterans’ preference right after the effective date of VEOA. *Dale v. Department of Veterans Affairs*, [102 M.S.P.R. 646](#), ¶ 8, review dismissed, 199 F. App’x 948 (Fed. Cir. 2006); *Abrahamsen v. Department of Veterans Affairs*, [94 M.S.P.R. 377](#), ¶ 6 (2003). The AJ did not make findings on these requirements. The record shows, however, that the appellant met his burden on these jurisdictional criteria.

¶17 Because the appellant here filed an untimely DOL complaint, and equitable tolling is not applicable, the correct result is not dismissal for lack of jurisdiction but denial of corrective action. *Garcia*, ¶ 13. Therefore, we AFFIRM the ID AS MODIFIED by this Opinion and Order. The appellant's request for corrective action under VEOA is DENIED because he failed to meet the time limit for filing a complaint with the Secretary of Labor under [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#).⁵

ORDER

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does

⁵ The appellant made a request for a hearing for the first time in his petition for review. Without finding whether the hearing request was untimely under [5 C.F.R. § 1201.24\(e\)](#), we find that a decision without a hearing is appropriate because there is no genuine dispute of material fact and the agency must prevail as a matter of law. 5 C.F.R. § 1208.23(b); *Haasz v. Department of Veterans Affairs*, [108 M.S.P.R. 349](#), ¶ 9 (2008).

not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.